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IN THE

Supreme Court of the United States

1967

CLYDE FRANKLIN LEE, GLEN DULEN BRECHEEN and CECIL ST. CLAIR MERRITT,
Petitioners,

v.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Petitioners submit herewith their jurisdictional statement as required by Rule 23 of the Rules of the Supreme Court of the United States.

OPINION BELOW

1. The opinion below, *Lee* v. *State* is reported in 191 So2d, 84. Petition for re-hearing was denied November 10, 1966. Petition for Writ of Certiorari to the Supreme Court of Florida was denied January 31, 1967, Case No. 35888. Petition for Re-hearing in the same court was denied February 23, 1967, Case No. 35888. The above opinion and orders of the respective courts are attached hereto as Appendix A.

GROUNDS FOR JURISDICTION

1. Petition for Writ of Certiorari to the Supreme Court of the United States is brought pursuant to 28 USC 1257 (3).

2. Petitioners seek review of, the Judgment of the District Court of Appeals, Fourth District, affirming the conviction of the petitioners, reported in 191 So2d, 84, filed September 21, 1966, and the Order of the Supreme Court of Florida denying Petitioners Writ of Certiorari entered January 31, 1967, and the subsequent Petition for Re-hearing in the same court which order was entered February 23, 1967.

QUESTIONS PRESENTED

Whether the trial Court erred over defendants' objections, in admitting into evidence tape recordings of telephone conversations in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Sections 1, 12 and 22 of the Declaration of Rights of the Florida Constitution and Section 822.10, Florida Statutes (F.S.A.).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or in-

dictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV (Section 1)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Florida

Declaration of Rights

(Section 1) Equality; inherent rights—All men are equal before the law, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring possessing and protecting property, and pursueing happiness and obtaining safety.

(Section 12) Double jeopardy; self-incrimination; eminent domain; right to work—No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation. The right of persons to work shall not be denied or abridged on account of membership or

nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

(Section 22) Searches and seizures—The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated and no warrants issued, but upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched and the person or persons, and thing or things to be seized.

Florida Statutes Annotated

Section 822.10 Injuring or tapping telegraph or telephone lines, etc.

Whoever, without the consent of the owner thereof, willfully destroys, damages, or in any way injures any telegraph, telephone, radio, television or television community antenna system poles, cables, wires, fixtures, antennas, amplifiers, or other apparatus, equipment, or appliances; or obstructs, impedes, or impairs the service of any telegraph, telephone, radio, television or television community antenna system line or lines, or the transmission of messages thereover; or attaches any unauthorized device or equipment to any telegraph, telephone, radio, television or television community antenna system line, antenna, pole, cable, wire, fixture, amplifier, or other apparatus, instrument, equipment or appliance, or taps or connects, directly or indirectly, by wire or any other means whatsoever, to or with any telegraph or telephone line so as to hear, or be in position to hear, or to enable any other person to hear, or be in position to hear, for any use or purpose whatsoever, any message going over said line, or for the purpose of receiving, or enabling any other person to receive any unauthorized service over said line,

or uses, or attempts to use, in any manner or for any purpose, or communicates in any way, any information so obtained; or aids, agrees with, employs, or conspires with, any person to do or cause to be done any of the acts hereinbefore mentioned, in cases where the property damage does not exceed two hundred dollars, shall be punished by fine not exceeding $500.00 or by imprisonment not exceeding one year in the county jail; provided that in cases where the property damage exceeds two hundred dollars or any person who, having been convicted of violating the provisions of this section, thereafter violates the provisions hereof, shall be punished, upon conviction, by imprisonment in the state prison for a period not exceeding fifteen years or by a fine not exceeding $5,000.00, or both.

STATEMENT OF THE CASE

The defendants below, LEE, BRECHEEN and MERRITT were brought before the Criminal Court of record in and for Orange County, Florida, on 13 count Information charging the defendants with violation of the lottery laws of the State of Florida, as set forth in the Information found on pages 1 thru 6 of the Record on Appeal (See appendix). Trial of the case was held before Honorable Walter N. Burnsides from June 9, 1964 to June 19, 1964, at the termination of which the following verdicts were returned in respect to these petitioners:

Clyde Lee—Guilty as charged in Counts I, V, VII, VIII, IX, X, XI, & XII, not guilty as charged in Counts II, III, IV, & VI.

Cecil St. Clair Merritt—Guilty as charged in Counts I, V & XIII, not guilty as charged in Counts II, III, & IV.

Glen Dulen Brecheen—Guilty as charged in Counts I, V, IX, X, XI, & XII, not guilty as charged in Counts II, III, & IV.

Petitioners were adjudged guilty and sentenced to State Penitentiary for conspiracy and violation of the lottery laws. That on the 2nd day of July, 1964, Motion for New Trial was filed and on the 21st day of July, 1964, the Court entered Order denying Motion for New Trial. Said Motion for New Trial embraced the question presented to this Court in the instant case and is found on page 22 and 23 in the Record on Appeal (See Appendix). Furthermore, said question before the Court was preserved in the Assignment of Errors as indicated on page 40 and 41 of the Record on Appeal. (See Appendix.)

The facts in the instant case in support of the question presented for review are essentially the same as reported by the District Court of Appeal, Fourth District in *Lee* v. *State*, supra.

> "The facts in the instant case show that the defendants requested a private line telephone, but were informed by the telephone company that no private line was then available and that they could obtain service only through a party line. The police department then arranged with the telephone company to have a telephone installed on the same party line. An automatic actuator and a tape recorder were attached to the telephone on the party line and recordings were made over a period of some eight days of conversations of the defendants on their telephone on the same party line. The recordings of these conversations were admitted in evidence."

ARGUMENT

It is the contention of the petitioners that evidence of tape recordings of telephone conversations on a party line as a result of a conspiracy between the Winter Park Telephone Company and the local police officers to invade the privacy of the petitioners is no longer tolerable in view of 47 U.S.C. § 605, Federal Communications Act.

The applicability of this statute to the instant case can be fully justified.

Petitioners further submit we are not unmindful of the decision of this Court in *Schwartz* v. *Texas*, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232. Nevertheless petitioners submit the limitations imposed in that decision are not applicable to the instant case. In the case of *Barber* v. *State*, 172 So.2d, 857 (Fla. App. 1965) decided by the First District Court of Appeals, the Court stated:

> *"The rule in Florida accords with the Federal Rule which on the authority of Section 605 of the Federal Communications Act (47 U.S.C.A. § 605) commonly known as the 'wiretapping statute'*, excludes such testimony unless obtained with the *knowledge* or *consent* of at least one of the conversants and as seen from the Griffith case, is predicated on Sections 12 and 22, Declaration of Rights, Constitution of Florida, F.S.A." (Emphasis supplied)

In view of the premises of this Florida Appellate Court, petitioners submit that the facts of the instant case may be decided in accordance with the decisions interpreting 47 U.S.C. § 605, rendered by this Court and other Federal Courts. In the alternative the petitioners further request this Court to review the limitations in *Schwartz* v. *Texas*, supra, to state court proceedings in light of the recent decisions of this Court. It should be noted that in this Court's decision in *Schwartz* the Court noted the Texas statute which provided that evidence obtained in violation of the Constitution or laws of Texas or the *Constitution* of the United States should be inadmissible in evidence. The Florida Constitution under the Declaration of Rights, Section Two, states that ". . . the paramount allegiance of every citizen is due to the Federal Government . . ." Certainly the Congress of the United States is an integral part of the Federal Government contemplated by the Florida Constitution. Therefore it is submitted that, by this avenue, that 47 U.S.C. § 605

is applicable to the instant case and that the statutory restrictions that confronted this Court in *Schwartz* are not applicable to the instant case. It is therefore the petitioners contention that by virtue of the case of *Barber* v. *State*, supra, wherein that Court stated that 47 U.S.C. § 605 is, in essence, the rule in Florida and the provision of the Florida Constitution whereby the citizens of this state have a paramount allegiance to the Federal Government, the instant case may be decided by this Court in accordance with the Federal decisions as to the admissibility of evidence received in a Florida state court in violation of 47 U.S.C. § 605.

Upon the facts of the instant case as stated by the Fourth District Court of Appeals in *Lee* v. *State*, 191 So.2d 84 (Fla. App. 1967), it is clear that after the petitioner Lee had requested a private line, the police conspired with the Winter Park Telephone Company to place the petitioner Lee on a party line and thereby secured evidence of telephone conversations with the other petitioners here, Brecheen and Merritt, as well as others, without the consent or knowledge of any subscriber or party thereto. The police were mere intruders and trespassers. In the recent case of *United States* v. *Pasha*, 332 F.2d 193 (1964), the Seventh Circuit Court of Appeals stated:

> "*. . . interception connotes a situation in which by surreptitious means a third party overhears a telephone conversation between two persons . . .*" (Emphasis supplied)

In an earlier case Judge Learned Hand stated in *United States* v. *Polakoff*, 112 F.2d 888 (2nd Cir. 1940), as follows:

> "The statute (§ 605, 47 U.S.C.A.) does not speak of physical interruption of the circuit, or of 'taps' *it speaks of 'interceptions' and anyone intercepts a message to whose intervention as a listener the com-*

municants do not consent; the means he employs can have no importance; it is the breach of privacy that counts." (Emphasis supplied)

Another very recent case applying the same disdain for the technical niceties is *United States* v. *Laughlin*, 1963, 223 F. Supp. 623, which held that recordings obtained through the use of an induction coil with the consent of one of the parties were not admissible. In a very forceful opinion, it was said:

> "To interpret the Federal Communications Act as meaning that a third party who can record a whole conversation on tape is not an *interception* does not, in my opinion, make sense for it is destructive of personal liberty. All this highly technical language to the effect that a mechanical device or an electronic device or an induction coil not directly attached to a telephone or a telephone line, but that is capable of recording a while conversation between the parties, is not an '*interception*' is sheer nonsense. *The Courts should meet the issue squarely and should not attempt to make technical distinctions between the mechanical methods used.* What difference does it make whether a tapped wire records a conversation and an induction coil or other mechanical device does the same thing? *To say that there is a difference is a sham and an illusion.* * * * It follows therefore, that *where a conversation is recorded, regardless of the methods or the means used, without the consent of one of the parties*, the right of privacy has been violated." (Emphasis added)

The scope of the Federal Communications Act is fully set forth in this Court's decision in *Benanti* v. *United States*, 355 U.S. 96, 2 L. ed. 2d, 126, 78 S. Ct. 155 (1957), wherein Chief Justice Warren stated:

> "The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. In order to safeguard those interests protected under § 605, that portion of the statute pertinent to

> this case applies both to intrastate and to interstate communications. (citing Weiss v. United States, 308 U.S. 321, 84 L. ed. 298, 60 S. Ct. 269). The natural result of respondent's argument is that both interstate and intrastate communication would be removed from the statute's protection because, as this Court noted in Weiss, the interceptor cannot discern between the two and will listen to both. Congress did not intend to place the protections so plainly guaranteed in § 605 in such a vulnerable position."

After considering other grants of authority delegated to the state under Title 47 U.S.C., the Court went on to say:

> "Moreover, the very existence of these grants of authority to the States underscores the conclusion that *had Congress intended to allow the States to make exceptions to § 605 it would have said so.*" (Emphasis supplied)

In view of this decision petitioners submit that a state court should be in no better position to thwart the "broader policy considerations motivating § 605" than a State legislature, since this Court has stated the Act applies to interstate and intrastate communications. Moreover the Legislature of Florida has enacted Section 822.10, Florida Statutes, F.S.A. which upon a bare reading embraces the proscriptions set forth in § 605.

From a reading of the concurring opinion of Chief Justice Warren in *Lopez* v. *United States*, 373 U.S. 427, 10 L. ed. 2d 467, 83 S. Ct. 1381 (1963) wherein he denounces the *Olmstead* case as well as the line of decisions that followed (Goldman v. United States, 316 U.S. 129, 86 L. ed. 1322, 62 S. Ct. 993, *On Lee* v. *United States*, 343 U.S. 747, 96 L. ed. 1270, 72 S. Ct. 967), it is submitted that the convictions of the petitioners should be reversed, without the application of 47 U.S.C. § 605, but by a profound emphasis of the "inviolate personal liberties" protected by the Fourth Amendment. In every day

talk, as of 1789, a man 'searches' when he looks or listens." We should be mindful of the development of the law, whether federal or state, without regard for the technical niceties that can illogically demonstrate a distinction without a difference when fundamental liberties of the organic law are being extinguished by logical solecisms.

Nine years after the decision in *Schwartz* v. *Texas*, supra this Court delivered its decision in *Mapp* v. *Ohio*, 367 U.S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684, wherein the Court stated:

> "Since the Fourth Amendment's right to privacy has been declared enforceable against the States through the due process clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.

The Court stated furthermore:

> "The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as 'basic to a free society'.
>
> After noting the constitutional rights protected by this Court when enforced against the State as well as the Federal Government this Court in *Mapp* through Mr. Justice Clark posed the question 'Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.?' By the same token why should this Court sanction a conspiracy to invade the right to privacy of the petitioners by a telephone company and local police officers? The question bespeaks of the unsoundness of the *Schwartz* decision wherein the Court has sanctioned a 'state rule of evidence' while completely ignoring the constitutional right to privacy which it seeks to protect in *Mapp*. The gravamen of the violation of the right to privacy protected by the Fourth

> Amendment in the instant case becomes aggravated and accentuated by the conspiracy to do it."

The inherent dangers in electronic eavesdropping and wiretapping has received virtual condemnation from many courts, including this one, in recent cases. For example see the able dissenting opinion of Judge Rawls in *Barber* v. *State*, 172 So.2d 857, and from this Court the forceful dissenting opinion of Mr. Justice Brennan with whom Mr. Justice Douglas and Mr. Justice Goldberg in *Lopez* v. *United States*, supra, wherein Mr. Justice Brennan gave vent not only to the dangers of electronic surveillance but to the growing enormity of the problem. There is great solace in the words of Mr. Justice Brennan where he stated in *Lopez* (10 L. ed. 2d 485):

> "The requirements of the Fourth Amendment are not technical or unreasonably stringent; they are the bedrock rules without which there would be no effective protection of the right to personal liberty. A search for mere evidence offends the fundamental principle against self-incrimination, as Lord Camden clearly recognized; a merely exploratory search revives the evils of the general warrant, so bitterly opposed by the American Revolutionaries; and without some form of notice, police searches became intolerable intrusions into the privacy of home or office. Electronic searches cannot be tolerated in the name of law enforcement if they are inherently unconstitutional."

If the Legislative policy of New York is not paramount to the "broader policy considerations that motivated § 605" as stated in the *Benanti* case, by the same token is a state court decision entitled to more latitude by substituting a "state rule of evidence" for the constitutional right to privacy recognized by this Court in the *Mapp* case.

In the case of *Shelley* v. *Kraemer*, 433 U.S. 1, 92 L. ed. (Adv. 845), 68 S. Ct. 836, 3 ALR 2d 441, decided whether a state court may enforce private agreements, gen-

erally described as restrictive covenants which have as their purpose to exclude ownership or occupancy of real property on grounds of race or color. The Supreme Court of the United States held that the state court could not enforce such an agreement and stated in support thereof:

> "But the examples of state judicial action which have been held by this Court to violate the Amendments commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. *It has been recognized that the action of state courts in enforcing a substantive common law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment.*" (Emphasis added)

Though the facts in the case at bar are different, nevertheless the Courts of this State have enforced agreements by police officers with the telephone companies to conduct surveillances of party line subscribers which they could not do if only private lines were in existence. This is manifestly a denial of the equal protection of the laws.

The corollary of the party line holder is obvious. If the police were to arrange with the telephone company, as the Fourth District Court of Appeal concluded they did in the instant case, to set up an extension on a private line and make tape recordings of telephone conversations, the conclusion is inescapable that such conversations would not be admitted into evidence. The net result is that those persons having a private line carry the immunities of the law without the burdens. Conversely those individuals who have a proprietory interest in a party line, as stated on the Barber case, must carry the burdens of eavesdropping at any time by police officials pursuant to their agreements with the telephone companies, without the equal protection of the law enjoyed by the private line holders. This is manifestly a discriminatory policy without any rational basis. As such it is predicated on the unavailability of private lines or economic feasibility of a poor

person to afford only a party line. If such a discriminatory policy remains in force, we are indirectly committed to the proposition that we are a government of men, not a government of laws.

Such distinctions are no longer tolerable if the recent decisions of this Court are to have force and reason and not be reduced to a 'form of words' *Mapp* v. *Ohio*, supra. It is therefore the contention of petitioners that *Schwartz* should briefly be revisited and briskly departed therefrom. *Schwartz* is no longer reconcilable with the reasoning in *Mapp* nor the dictum, as previously stated, in *Benanti*. It is undetermined at this point how many party lines exist in Florida or in the nation. But if conspiracies that are present in the facts of this case are permitted to continue, *Schwartz* will stand as nothing more than an "open-door" policy to flagrant violations of the right to privacy. Convictions obtained in violation of the legislative mandate and the organic law of the state and the nation can no longer be written off as a preference for a rule of evidence. The history and decision of this Court will not justify such a conclusion.

CONCLUSION

For the aforesaid reasons and authorities, petitioners respectfully request this Court to grant certiorari.

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